Supreme Court, U.S.
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No. 96-452

In The

Supreme Court of the United States

October Term, 1996

EARL G. PITRE, Jr., EARL G. PITRE, Sr. and JOAN PITRE,

Petitioners,

vs.

LOUISIANA TECH UNIVERSITY AND THE STATE OF LOUISIANA THROUGH THE BOARD OF TRUSTEES FOR STATE COLLEGES AND UNIVERSITIES,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Louisiana

RESPONDENTS' BRIEF IN OPPOSITION

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents request that the Court deny the petition for writ of certiorari seeking review of a decision of the Supreme Court of the State of Louisiana. That decision is reported at 673 So.2d 585, Nos. 95-1466, 95-1487 (La. 5/10/96) (Appendix A to the petition). The Louisiana Supreme Court denied rehearing on June 28, 1996, 95-C-1466 (Appendix B to the petition).[1]

STATEMENT OF JURISDICTION

This Court cannot properly exercise jurisdiction over this case pursuant to 28 U.S.C. § 1257(a). The alleged constitutional issue presented for review in the petition was not presented to the Louisiana Supreme Court. Thus, that issue may not properly be considered on a petition for writ of certiorari to this Court. See discussion at pages 7-10 below.

STATEMENT OF THE CASE

Respondents respectfully oppose the petition for writ of certiorari. Jurisdiction in this Court is not proper because in their application for rehearing before the Louisiana Supreme Court petitioners did not contend, as they do in the petition, that the court violated petitioners' due process and equal protection rights by allegedly failing to

[1] All citations to the Louisiana Supreme Court's decision will be to the opinion attached as Appendix A to the petition.

follow the appropriate standard of appellate review. Furthermore, petitioners are mistaken in their view that the Louisiana Supreme Court failed to follow the appropriate standard of review. It is clear from the court's opinion that the standard was correctly followed.

Petitioners' argument that this alleged failure by the Louisiana Supreme Court to follow the appropriate standard of review violates petitioners' constitutional rights under the due process clause of the Fourteenth Amendment of the Constitution is also insubstantial. Finally, to the extent petitioners claim the Louisiana Supreme Court also violated petitioners' rights under the Louisiana Constitution, since that argument also was not first presented to the Louisiana Supreme Court for its review, this Court is prohibited from considering it.

A. Course of Proceedings and Disposition of the Case Below.

This is a personal injury suit brought by Earl G. Pitre, Jr. and his parents against Louisiana Tech University and the university's governing board, the Board of Trustees for State Colleges and Universities. In their suit plaintiffs claimed that the defendants were responsible for an accident on the university campus when Mr. Pitre, Jr. struck a light pole while sledding causing him to be paralyzed from approximately the mid-chest down.

Plaintiffs' suit was filed in the Third Judicial District Court, Parish of Lincoln, State of Louisiana. In response to plaintiffs' suit the defendants filed a motion for summary judgment contending that the light posts in the

parking lot were readily observable and thus not unreasonably dangerous and that defendants had no duty to warn of the existence of this condition.

Plaintiffs filed a cross motion for partial summary judgment arguing that the university was liable for Mr. Pitre's injuries as a matter of law and leaving for trial the issues of damages and plaintiffs' comparative negligence. The trial court granted the university's motion for summary judgment and dismissed plaintiffs' suit. The trial court found that there was no dispute of fact as to whether the light poles were easily observable and that as a matter of law the defendants had no duty to warn Mr. Pitre of this readily observable condition.

Plaintiffs appealed to the Louisiana Second Circuit Court of Appeal. On original hearing before a three judge panel of that court in a two to one decision the judgment of the trial court was affirmed. However, a rehearing was granted before a five judge panel, and the judgment of the trial court was reversed in a three to two decision. *Pitre v. Louisiana Tech University*, 596 So.2d 1324 (La. App. 2nd Cir. 1991), on rehearing, rehearing denied. (*"Pitre I"*) On the summary judgment record the court found a fact based duty of Louisiana Tech to plaintiffs and remanded the case for trial. The Louisiana Supreme Court denied defendants' application for writ of certiorari. *Pitre v. Louisiana Tech University*, 604 So.2d 998 (La. 1992).

Following a six day bench trial in March of 1993 the trial judge again found that the university had no duty

under the facts as found by the trial court[2] and dismissed plaintiffs' suit. On appeal in a four to one decision a five judge panel of the Second Circuit Court of Appeal reversed the trial court. *Pitre v. Louisiana Tech University*, 655 So.2d 659 (La. App. 2nd Cir. 1995). ("*Pitre II*") The court found that the trial judge erred in revisiting the duty issue because the Second Circuit's finding of a duty on the original summary judgment appeal was the "law of the case". The court then found both the university and Mr. Pitre to be negligent under the circumstances and responsible for Mr. Pitre's injuries and apportioned fault twenty-five percent to the university and seventy-five percent to Mr. Pitre. The court awarded Mr. Pitre general damages of $2,500,000.00, past medical expenses of $128,770.87 and $1,163,831.00 in future medical expenses based upon the present value of the life care plan. Mr. Pitre's parents were each awarded $35,000.00 for loss of consortium. The court rejected Mr. Pitre's claims for past wage losses and loss of future earning potential.

The Louisiana Supreme Court granted applications for writs of certiorari filed by both plaintiffs and defendants. In a five to two decision the Louisiana Supreme Court reversed the Court of Appeal decision and dismissed plaintiffs' suit. After examining the evidence, two justices agreed with the trial court who had found on two separate occasions (the motion for summary judgment and the trial on the merits) that the area where the sledding took place was well lit and that the light pole was "readily observable" or "clearly visible" by those engaged in sledding that night. App. 17. On this basis

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[2] The decision of the trial court is unreported but is contained in the appellate record.

these justices found that the defendants had no duty to warn since the likelihood of harm was slim to anyone exercising reasonable care.

Three other justices based their decision to deny plaintiffs' claim on the basis that the defendants had not breached their general duty to act reasonably in view of the foreseeable risks of danger to students resulting from the winter storm in question. Two justices dissented.

Plaintiffs timely filed an application for rehearing in the Louisiana Supreme Court and supplemented that application with an additional memorandum. In the application and its supplement the plaintiffs complained, as they do now in this court, among other things, that the concurring justices erred in failing to apply the proper standard of appellate review. However, the plaintiffs *did not claim* that any such error violated any of plaintiffs' constitutional rights under either the Constitution of the United States or the Louisiana Constitution.

The Louisiana Supreme Court denied plaintiffs' application for rehearing without opinion. See App. 34. Plaintiffs now seek to have this Court grant a writ of certiorari to review the decision of the Louisiana Supreme Court.

B. Correction of Misstatements in the Petition.

The opinion of the Louisiana Supreme Court correctly sets forth the facts of this case. See Appendix A. In the interest of making this brief as concise as possible respondents respectfully direct the Court's attention to the facts as set forth therein.

Of significance to the finding of no duty by two justices and no breach of duty by the concurring justices was the conclusion that the trial court was correct in its factual finding that "the area was well-lit on the evening of the accident, and that the light pole was 'readily observable' or 'clearly visible' by those engaged in sledding that night." App. at 17. In support of its conclusion, the court at length reviewed the facts presented to the trial court (App. 17-19) and said:

> "This evidence overwhelmingly demonstrates that the parking lot was well-lit, and as the trial court found, that the light pole should have been readily apparent and observable to anyone sledding on the Assembly Center hill on the evening of the accident. Thus, the likelihood of harm was slim to anyone exercising reasonable care." App. at 19-20

Significantly, the court of appeal did not disturb the trial court's finding of fact in that regard. The court of appeal did not even discuss that factual issue. Thus, plaintiffs cannot now complain, as they attempt to in their "factual background" that the "base of the pole . . . was not illuminated" or that otherwise the pole was difficult to see. Petition at page 6.

Plaintiffs' attempt to reargue the facts is without avail. The five justices voting to overturn the court of appeal did so on the factual basis that, as the trial court found, "the area was well-lit on the evening of the accident, and that the light pole was 'readily observable' or 'clearly visible' by those engaged in sledding that night." App. at 17.

It should be noted, however, that with respect to plaintiffs' contention concerning campus police policy, the supreme court said:

> "The trial court held that Tech did not have a departmental policy regarding sledding in general, but would stop it on a case-by-case basis depending on the individual officer and the situation. The record supports this finding." App. at 23.

Interestingly, the court of appeal in finding such a policy (App. at 43) failed to give proper deference to the trial court's finding otherwise. Thus, the court of appeal failed to apply the same appellate review standard as to factual findings that the plaintiffs contend the supreme court failed to do in its decision. Otherwise, plaintiffs attempt to rehash in their statement of facts factual issues which were disposed of by the trial judge and accurately reflected in the supreme court's opinion. Respondents respectfully refer this Court to that opinion for a correct understanding of the facts as found by the trial court. Furthermore, to the extent petitioners attempt to argue their case in the factual background, the Court should disregard that argument.

REASONS FOR DENYING THE WRIT

I.

THIS COURT HAS NO JURISDICTION TO CONSIDER PETITIONERS' ARGUMENTS.

As was stated by this Court in *Yee v. Escondido*, 503 U.S. 519, 118 L.Ed.2d 153, 112 S.Ct. 1522 (1992):

> "In reviewing the judgments of state courts under the jurisdictional grant of 28 USC § 1257 [28 USCS § 1257], the Court has, with very rare exceptions, refused to consider petitioner's claims that were not raised or addressed below." 118 L.Ed.2d at 169.

In *Yee* because petitioners did not raise their substantive due process claim in the state courts, and because the state courts did not address it, this Court refused consideration of it.

See also *Illinois v. Gates*, 462 U.S. 213, 76 L.Ed.2d 527, 103 S.Ct. 2317 (1983); *Webb v. Webb*, 451 U.S. 493, 68 L.Ed.2d 392, 101 S.Ct. 1889 (1981); *Monks v. New Jersey*, 398 U.S. 71, 26 L.Ed.2d 54, 90 S.Ct. 1563 (1970); *Cardinale v. Louisiana*, 394 U.S. 437, 22 L.Ed.2d 398, 89 S.Ct. 1162 (1969); *Street v. New York*, 394 U.S. 576, 22 L.Ed.2d 572, 89 S.Ct. 1354 (1969); *Beck v. Washington*, 369 U.S. 541, 8 L.Ed.2d 98, 82 S.Ct. 955 (1962).

Petitioners contend to this Court that their Fourteenth Amendment due process and equal protection rights were violated by the Louisiana Supreme Court when it allegedly failed to follow the appropriate standard for appellate review of facts in overturning the Louisiana Court of Appeal decision and dismissing plaintiffs' suit. In their application for rehearing to the Louisiana Supreme Court plaintiffs contended that the court had failed to follow the appropriate standard for appellate review of facts. However, plaintiffs did not contend, as they do now, that this alleged failure amounted to a deprivation of their constitutional rights. Their failure to do so deprives this Court of jurisdiction.

In *Webb v. Webb*, supra, this Court explained why it should refuse the petition presented:

> "Principles of comity in our federal system require that the state courts be afforded the opportunity to perform their duty, which includes responding to attacks on state authority based on the federal law, or, if the litigation is wholly private, construing and applying the applicable federal requirements.
>
> * * *
>
> There are also very practical reasons for insisting that federal issues be presented first in the state-court system. The requirement affords the parties the opportunity to develop the record necessary for adjudicating the issue. It permits the state courts to exercise their authority, which federal courts, including this one, do not have at least to the same extent, to construe state statutes so as to avoid or obviate federal constitutional challenges such as vagueness and overbreadth. The rule also insures that if there are independent and adequate state grounds that would pretermit the federal issue, they will be identified and acted upon in an authoritative manner. Finally, if the parties to state-court litigation are required to present their federal claims in the state tribunals in the first instance, those issues will be adjudicated in the state courts where necessary to dispose of the case. In most instances, such a judgment will be supported by an opinion that may well obviate any reason for our giving plenary consideration to the case. In terms of our own workload, this is a very substantial matter." 451 US at 499-501.

Had the plaintiffs contended to the Louisiana Supreme Court that its alleged failure to follow the appropriate standard of appellate review violated their constitutional rights, that court could have considered and addressed that issue. In all likelihood it could have disposed of the issue in a way that would obviate the need for this Court to consider the issue as presented. However, since the issue was not raised below and the Louisiana Supreme Court did not address it this Court should decline jurisdiction on that basis.

II.

THE LOUISIANA SUPREME COURT APPLIED THE APPROPRIATE STANDARD FOR APPELLATE REVIEW OF FACTS.

Respondents agree with petitioners' statement of Louisiana law concerning the appropriate standard for appellate review of facts in Louisiana. However, petitioners apparently misunderstand that standard and they argue for a misapplication of it in this case. Additionally, they are simply wrong that the concurring justices failed to apply the appropriate standard.

If there was any misapplication of the appropriate appellate review of facts in this case it was by the court of appeal and not by the supreme court. It may be of some help to this Court to see the errors of the court of appeal which then caused this case to be presented to the supreme court in the way it was presented.

As indicated above the respondents initially moved for summary judgment on the basis that there was no dispute of fact that the pole in question was readily

observable and thus not unreasonably dangerous. The trial court agreed and dismissed plaintiffs' suit on the basis that the defendants had no duty to warn of an otherwise readily observable danger. Without disturbing that factual determination by the trial court, the court of appeal then weighed in (after initially having affirmed the trial court), sifted through some otherwise disputed facts, and on *the summary judgment record* found some facts which were clearly in dispute. For example, the court of appeal found that a winter storms bulletin published by Tech's Housing Office "established Tech's knowledge of the general risk of injuries related to sledding, stating that: . . . Fifteen reported personal injuries were associated with such behavior (sledding) during the last snow." *Pitre I* at 1332. A simple review of the bulletin shows this finding to have been in error. The court of appeal added the word "sledding" in parenthesis following the word "behavior". In fact, as the bulletin clearly shows the behavior referred to was sledding down the hills along Tech Drive *into the path of oncoming cars* and *being dragged behind a moving vehicle*. Neither of these behaviors is merely "sledding" as found by the court of appeal.

Additionally, as the record clearly shows Mr. Glenn Theis, the then acting director of housing was the person who inserted the phrase "fifteen reported personal injuries were associated with such behavior during the last snow." (Theis deposition, page 18)[3] Mr. Theis received this information from the administrator of Lincoln General Hospital. (Theis deposition, page 10) Mr. Theis

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[3] Mr. Theis' testimony was submitted to the court by deposition which was made an exhibit at the trial.

"guessed" that about half those were from sledding behind cars. (Theis deposition, page 21) Mr. Theis did not know how many injuries resulted from sliding down hills. (Theis deposition, page 21) It is not even clear from Mr. Theis' testimony that any of the injuries actually occurred on the Tech campus. (Theis deposition, page 21) The campus police were unable to find any accident reports indicating reported injuries anywhere on campus during the previous years following the building of the Assembly Center. 3 R 888, 890 and 891.[4]

Furthermore, the court of appeal found, again, *based upon disputed facts,* without benefit of trial, that the Tech police had a policy which prohibited sledding anywhere on campus. Id. at 1332. It also found as fact on the summary judgment record that "despite that knowledge, Tech's Housing Office 'encouraged' this twenty year old student who had no prior experience with this uncommon activity to undertake the risk." Id. at 1333. This fact was clearly disputed in the summary judgment record which was before the court of appeal. It was then based upon these "findings of fact" by the court of appeal on the summary judgment record that it found a fact based duty in Louisiana Tech to Mr. Pitre under the circumstances presented.

Following a six day bench trial on the merits and a review of over fifty depositions and affidavits and numerous other exhibits, the trial court *after weighing the evidence* found that:

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[4] The appellate record is contained in several volumes of sequentially marked pages. 3 R 888 refers to Volume 3 of the appellate record at page 888.

> "The Louisiana Tech University Police did not have a departmental 'policy' regarding sledding in general. Several officers answered, in response to that question, that there was a departmental policy. As many officers responded that there was not. Each officer's response to this question indicated that he reacted to the situation as he thought appropriate under the circumstances. . . . The officers' response to sledding was no different from that to any other student activity which the officers had occasion to observe." Opinion pages 12-13.[5]

Concerning the winter storms bulletin, the trial court found that:

> "Furthermore, the winter storms bulletin was not the impetus which began this particular activity. . . . No one, including Mr. Pitre, testified that the document was discussed or considered prior to these sledding activities." Opinion pages 11-12.

As is shown by reference to *Pitre II* (App. B), although that court did not disturb (or even discuss) the trial court's factual finding with respect to the observability of the pole, the court wrapped itself in its former decision finding a duty (*Pitre I*) and reversed the trial court based on "law of the case". It was there that the court of appeal fell into error because in the first instance (*Pitre I*) it had attempted to act as a fact finder on a summary judgment record and then it compounded that

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[5] The opinion is contained within the appellate record.

error following the trial (*Pitre II*) by refusing to give proper deference to the trial court's fact finding.

Thus, on the record in the Louisiana Supreme Court there were factual findings of the trial court which had not been disturbed (or even discussed) by the court of appeal. Additionally, there were factual findings by the court of appeal which differed from facts as found by the trial judge. Nowhere to be found was an explanation why the appellate court refused to defer to the findings of the trial court. Nor was there a determination that the trial court's findings were in error, manifest or otherwise.

The concurring justices gave appropriate deference to the trial court's factual findings. Justice Victory who wrote for the two justices who found no duty, at length reviewed the evidence that the light poles were obvious and apparent. It was upon that factual basis that the concurring justices found no breach of duty:

> "Because the particular risk in this case of colliding with the light poles was obvious and apparent to everyone, including the plaintiff and his companions, no warning was required, and the defendant did not breach its duty of reasonable care by failing to warn of that particular risk or by failing to erect protective barriers." (App. at 30)

Thus, the supreme court followed the appropriate appellate review of facts in giving deference to the trial court concerning a factual issue which the court of appeal did not even address. Therefore, petitioners are simply mistaken in their view that the Louisiana Supreme Court misapplied the standard of appellate review of facts.

Since petitioners raised this issue on rehearing to the Louisiana Supreme Court and the Louisiana Supreme Court refused their application for rehearing, it must have concluded that it followed the appropriate standard for appellate review.

III.

THERE IS NO DUE PROCESS OR EQUAL PROTECTION RIGHT TO A FAILURE TO FOLLOW THE APPROPRIATE APPELLATE STANDARD FOR REVIEW OF FACTS.

Even assuming petitioners are correct that the concurring justices failed to follow the appropriate standard for appellate review of facts, they have not expressed a reason why this failure should amount to a violation of their due process or equal protection rights. As this court said in *United States ex rel. Darcy v. Handy*, 351 U.S. 454, 462, 100 L.Ed. 1331, 1338, 76 S.Ct. 965 (1956):

> "While this Court stands ready to correct violations of constitutional rights, it also holds that 'it is not asking too much that the burden of showing essential unfairness be sustained by him who claimed such injustice and seeks to have the results set aside, and that it be sustained not as a matter of speculation but as a demonstrative realty.' "

See also *Beck v. Washington*, supra, 369 U.S. at 558, 8 L.Ed.2d at 112.

Petitioners have failed to demonstrate any violation of their constitutional rights. They cite only a reference to

a punitive damages case[6] where the Court found that among other procedural protections, the petitioner "also received the benefit of appropriate review by the Supreme Court of Alabama." 499 U.S. at 23, 113 L.Ed.2d at 23. Taking firm grip of that statement along with their misapprehension of some comments by Justice Scalia,[7] petitioners say:

> "It is reasonable to conclude that this Court would find that the constitutional right to a substantively correct review (i.e. traditional procedure) is a fundamental right in compensatory damage awards also, and that this right is guaranteed by the due process clause of the Fourteenth Amendment." (Petition at page 11)

Thus, petitioners would contend that in *every case* where a litigant's compensatory damages have been taken away by an appellate court, there is an issue as to whether not only did that appellate court properly follow the appropriate standard of appellate review of facts *but also* whether any failure to do so violated the litigant's constitutional rights. Petitioners are saying that in every tort suit there lurk constitutional issues needing to be addressed. If this is so, can our courts handle the flood to follow? Petitioners have articulated no reason why this Court should open these flood gates.

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[6] *Pacific Mutual Life Insurance Company v. Haslip*, 499 U.S. 1, 18, 113 L.Ed.2d 1, 20, 111 S.Ct. 1032 (1991), where the court noted "once again our concern about punitive damages that 'run wild.' "

[7] *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 125 L.Ed.2d 366, 387, 113 S.Ct. 2711 (1993).

In discussing whether the Equal Protection Clause affords protection to a petitioner who claimed he had been denied the procedural safeguards the law affords others to insure an unbiased grand jury[8] this Court's statement may be helpful:

> "We have said time and again that the Fourteenth Amendment does not 'assure uniformity of judicial decisions . . . [or] immunity from judicial error. . . . ' *Milwaukee Electric R. & Light Co. v. Wisconsin*, 252 US 100, 106, 64 L ed 476, 480, 40 S Ct 306, 10 ALR 892 (1920). Were it otherwise, every alleged misapplication of state law would constitute a federal constitutional question."

IV.

SINCE PETITIONERS FAILED BELOW TO CLAIM ANY VIOLATION OF THEIR LOUISIANA CONSTITUTIONAL RIGHTS THEY CANNOT NOW MAKE THAT CLAIM BEFORE THIS COURT.

For the same reasons stated previously to the extent petitioners now claim for the first time that their Louisiana constitutional rights have been violated, since they did not make that claim to the Louisiana Supreme Court, they cannot make it here. Additionally, Louisiana law is clear that Louisiana appellate courts are forbidden to consider constitutional questions not raised by the pleadings at the trial court level. See *Stovall v. City of Monroe*,

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[8] *Beck v. Washington*, supra.

199 La. 195, 5 So.2d 547 (La. 1941). Obviously, since petitioners are claiming the Louisiana Supreme Court in its decision violated their constitutional rights their first opportunity to raise that issue was on rehearing. Since they failed to raise the issue on rehearing, *a fortiori*, they should not now be allowed to raise it to this Court.

CONCLUSION

For all the reasons stated above respondents respectfully submit that this Court should decline petitioners' petition for writ of certiorari to review the decision of the Louisiana Supreme Court.

Respectfully submitted,

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